

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:BRK:TL-N-7066-99
HNAdams

date: December 6, 1999

to: Brooklyn Appeals Office
Attn: Harold J. Finkelstein, Acting Chief

from: District Counsel, Brooklyn

subject: Request for Legal Opinion - Statutory Notice - Last Date for Filing
Petition

U.I.L. 6213.00-00

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BACKGROUND

Reference is made to your request of November 29, 1999 regarding statutory notices issued to the following taxpayers:

<u>Taxpayer</u>	<u>Date Issued</u>	<u>Last Date Indicated for Filing Petition</u>
[REDACTED]	[REDACTED]	[REDACTED]

We understand that the dates listed on the statutory notices as the last dates for filing petitions with the Tax Court were incorrect. Rather than 90 days, the dates listed were 150 days.

When the notices of deficiency were mailed, the statute date for [REDACTED] was being held open under a Form 872-A and the statute date for the other three taxpayers was open under Form 872 until [REDACTED].

ISSUES

1. Does the inclusion of the incorrect dates for filing Tax Court petitions make the notices invalid?
2. Should Appeals issue second statutory notices to correct its errors?
3. Should Appeals wait until after the last dates stated in the statutory notices for filing Tax Court petitions before assessing the deficiencies determined in the notices?¹

CONCLUSIONS

1. The inclusion of the incorrect dates for filing Tax Court petitions does not invalidate the notices.
2. We do not recommend that Appeals issue second notices to the taxpayers.
3. We recommend that Appeals ensure that the deficiencies determined in the statutory notices are assessed before the expiration of the periods of limitation on assessments. Appeals should be aware that although the statutory notices at issue state that the taxpayers have 150 days from the dates they were mailed to file Tax Court petitions, the Service will be free to assess the deficiencies determined in the notices after the expiration of 90 days from the dates they were mailed unless the taxpayers have filed Tax Court petitions. It appears that it may be necessary to assess the deficiencies before the last dates stated for filing Tax Court petitions.

DISCUSSION

1. Validity of Notices

We do not believe that the inclusion of the incorrect dates for filing Tax Court petitions invalidates the notices. Section 3463(a) of the IRS Restructuring and Reform Act of 1998 imposed upon the Service the requirement to include on each notice of deficiency "the date determined by [the Service] as the last day on which the taxpayer may file a petition with the Tax Court." The legislative history to that provision explains that the change was made because Congress believed "that taxpayers should receive

¹ This issue was not raised in your memorandum to us but needs to be addressed.

assistance in determining the time period within which they must file a petition in the Tax Court and that taxpayers should be able to rely on the computation of that period by the IRS." H.R. Rep. No. 105-364, pt. 1. Consistent with Congress's intention that taxpayers should be able to rely on the computation of that period by the IRS, Code section 6213(a) was changed by the addition of the following sentence: "Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed." That sentence modified the general rule provided by Code section 6213(a) that petitions are required to be filed within 90 days or 150 days (if the notice is addressed to a person outside the United States). We believe that the addition of that sentence establishes that Congress contemplated the possibility that the Service would indicate the wrong date on statutory notices and that, in such a circumstance, the erroneous date would not invalidate the notice and could be relied upon by the taxpayer.

2. Should Appeals Issue Second Statutory Notices to Correct its Errors?

The Service is not precluded from issuing second notices of deficiency to the taxpayers provided the taxpayers have not filed Tax Court petitions with respect to the first notices.² See Jones v. United States, 889 F.2d 1448, 1450-51 (5th Cir. 1989); Gmelin v. Commissioner, T.C. Memo. 1988-338, aff'd without published opinion, 891 F.2d 280 (3d Cir. 1989). However, the issuance of second notices would not rescind the first notices.³ As we concluded above, the inclusion of the incorrect dates for filing Tax Court petitions does not invalidate the first notices. The taxpayers could file Tax Court petitions based on the first notices despite

The Service may also issue second notices of deficiency to taxpayers in other situations which do not appear to apply here, such as if the case of fraud. See I.R.C. § 6212(c)(1).

Service policy regarding the rescission of statutory notices is set forth in Revenue Procedure 98-54, I.R.B. 1998-43, 7. That Revenue Procedure provides that whether a notice of deficiency will be rescinded is discretionary on the part of the Secretary and that a notice of deficiency will be rescinded only with taxpayer consent. Sec. 4.02. The Service's issuance of second notices of deficiency before the expiration of the time within which to petition the first notices would give the taxpayers an option to petition either notice. G.C.M. 33366, In re: Statutory Notice of Deficiency, 1-2166 (November 3, 1966), at 6.

the issuance of second notices, and the filing of such petitions would invalidate the second notices. I.R.C. § 6212(c)(1); Stamm International Corp. v. Commissioner, 84 T.C. 248, 252 (1985). See also, Campbell v. Commissioner, T.C. Memo. 1988-105 (reciting that Tax Court had granted motion to dismiss petition based on invalid second notice) and Gmelin v. Commissioner, *supra* (agreeing that court lacked jurisdiction over petition filed with respect to second notice because taxpayer filed Tax Court petition with respect to first notice).

3. Should Appeals Wait Until After the Last Dates Stated in the Statutory Notices for Filing Tax Court Petitions Before Assessing the Deficiencies Determined in the Notices?

We recommend that Appeals ensure that the deficiencies determined in the statutory notices are assessed before the expiration of the periods of limitation on assessments. In this regard, we note that although the statutory notices at issue state that the taxpayers have 150 days from the dates they were mailed to file Tax Court petitions, the Service will be free to assess the deficiencies determined in the notices after the expiration of 90 days from the dates the notices were mailed unless the taxpayers have filed Tax Court petitions. Although Code section 6213(a) was modified to allow taxpayers to file Tax Court petitions anytime before the last date specified in a notice for doing so, the period within which the Service is prohibited from assessing deficiencies determined in a notice was not similarly extended. The period during which the Secretary is prohibited by Code section 6213(a) from assessing a deficiency following the issuance of a notice of deficiency remains at 90 days (or 150 days if a notice is addressed to a person outside the United States). That section continues to provide that:

TIME FOR FILING AND RESTRICTION ON ASSESSMENT. -- Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by Subtitle A or B * * shall be made * * * until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be * * *.

Similarly, Code section 6503(a)(1) continues to state that:

GENERAL RULE. -- The running of the period of limitations provided in section 6501 or 6502 * * * on the making of assessments * * * in respect of any deficiency as defined in section 6211 * * * shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment * * * and for 60 days thereafter.

As a result, the running of the periods of limitation is suspended only during the 90 day period rather than the full 150 days incorrectly stated in the notices.

We note that it appears that it might be necessary to assess the deficiency determined with respect to [REDACTED] before the expiration of the 150 days stated in the notice issued to him.⁴ The statutory notice issued with respect to [REDACTED] triggered the provision in the Form 872-A for the year at issue that provides that the period for assessing the tax for the period covered by that form ends 60 days after the period during which the making of an assessment is prohibited. Under Code section 6213(a), respondent is prohibited from assessing the tax for the period covered by the statutory notice for 90 days after [REDACTED]. That date is [REDACTED]. Sixty days from that date is [REDACTED] (a Saturday), which is approximately the same date stated in the notice as the last day for filing a petition ([REDACTED] a Sunday).⁵

We note that it may also be necessary to assess the deficiencies determined in the notices to the other taxpayers before the date stated in the other notices as the last date to file Tax Court petitions as there will be little time between that date [REDACTED] and the [REDACTED] expiration of the time stated in the Form 872 for the Service to assess those deficiencies.

⁴ If it is necessary to assess the deficiency before the expiration of the time stated as the last date to file a Tax Court petition, Appeals should be prepared to abate the assessment if the taxpayer files a timely Tax Court petition.

⁵ We note that the time for filing a Tax Court petition could not expire on [REDACTED] as that date is a Sunday. See I.R.C. § 6213(a).

Assessing deficiencies before the expiration of the period within which taxpayers file petitions would create the possibility that the taxpayers might file petitions after the assessments are made. Although the assessments would be valid, we believe it would be inconsistent with the legislative intent that taxpayers should receive assistance in determining the time period within which they must file a petition in the Tax Court and that taxpayers should be able to rely on the computation of that period by the IRS for the Service to begin collection action before the expiration the period stated in the notice. As a result, we recommend that the Service freeze collection action on deficiencies assessed before the expiration of the period stated in the notice until the expiration of that period or the final resolution of any action begun based on a Tax Court petition filed within the period.²⁴ That action would preserve the Tax Court's status as a prepayment forum and harmonize with Congress's intent.

You should be aware that, under routine procedures that have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary. If you have any questions, you should call Halvor Adams at (516) 688-1737.

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By:

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Code section 6502(a) provides that tax must generally be collected within 10 years after assessment. In the unusual event that an action based on a Tax Court petition filed in response to a notice is not resolved before that collection period is due to expire, a decision would have to be made at some point to remove the collection freeze code to enable the Service to collect the tax before the resolution of the action.